

Explanatory Memorandum to The Child Minding and Day Care (Disqualification) (Wales) Regulations 2010

This Explanatory Memorandum has been prepared by the Department for Children, Education, Lifelong Learning and Skills, and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 24.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Child Minding and Day Care (Disqualification) (Wales) Regulations 2010.

Huw Lewis

Deputy Minister for Children

28 June 2010

1. Description

- 1.1 **The Child Minding and Day Care (Disqualification) (Wales) Regulations 2010** set out the categories of persons who are disqualified from registration in Wales as child minders or providers of day care under part 10A of the Children Act 1989.
- 1.2 A person who is disqualified from registration as a childminder or provider of day care must not act as a child minder in Wales or provide day care in Wales, or be directly concerned in the management of any provision in Wales.

2. Matters of special interest to the Constitutional Affairs Committee

- 2.1 There are no matters of special interest.

3. Legislative background

- 3.1 The Welsh Ministers make these regulations in exercise of the powers conferred by 79C(2) and (3), 79M(1)(c) and 104(4) and paragraph 4 of Schedule 9A to the Children Act 1989.
- 3.2 This statutory instrument follows the negative resolution procedure.

4. Purpose & intended effect of the legislation

- 4.1 The proposed regulations amend the Disqualification from Caring for Children (Wales) Regulations 2004. They define the categories of people who are disqualified from registration as childcare providers.
- 4.2 Persons disqualified under these Regulations must not provide day care or be concerned in the management of, or have any financial interest in, any provision of day care. Nor must they be employed in connection with the provision of day care.
- 4.3 In England the Childcare Disqualification Regulations 2009 apply to disqualification from registration under the Childcare Act 2006. The principal differences between the English regulations and the existing Disqualification from Caring for Children (Wales) Regulations 2004 are that the former provides for:-
- the inclusion of cautions as well as convictions in respect of offences which a person has been found to have committed;
 - the addition of overseas offences;
 - the inclusion of repealed statutory offences (reg 4 (5) and Schedule 2); and
 - no waiver if included on a barred list or subject to court disqualification order (reg 10 and see Exp Note).

- 4.4 This means that there is currently a potential safeguarding gap in that equivalent regulations in England cover a wider group of people who may be disqualified. A person in either of these categories would currently be disqualified in England and not in Wales.
- 4.5 This raises a risk that a person who is disqualified from caring for children in England could, instead, become registered as a child carer in Wales, where existing legislation does not include the disqualification categories noted at 4.2.
- 4.6 Amendment to regulations in Wales would provide the opportunity to include the above categories, bringing English and Welsh legislation in this area into line, whilst also allowing the opportunity to separate Disqualification regulations from private fostering.
- 4.7 A private fostering arrangement is defined in s.66 Children Act 1989 and is essentially one that is made privately (that is to say without the involvement of a local authority) for the care of a child under the age of 16 (under 18, if disabled) by someone other than a parent, a person with parental responsibility or close relative with the intention that it should last for 28 days or more. Private foster carers may be from the extended family, such as a cousin or great aunt. However, a person who is a relative under the Children Act 1989 i.e. a grandparent, brother, sister, uncle or aunt (whether of the full or half blood or by marriage or civil partnership) or step-parent will not be a private foster carer. A private foster carer may be a friend of the family, the parent of a friend of the child, or someone previously unknown to the child's family who is willing to privately foster a child.
- 4.8 The existing Disqualification from Caring for Children (Wales) Regulations 2004 apply to both private fostering as well as childminding and day care. The powers to regulate private fostering arrangements remain under the Children Act 1989, whilst primary powers to regulate childminding and day care provision for children under the age of eight are moving from the Children Act 1989 to the Children and Families (Wales) Measure 2010 in April 2011. It, therefore, seems reasonable to take this opportunity to also separate disqualification regulations for childminding and day care from private fostering as regulations will underpin different primary powers.
- 4.9 The existing regulations currently allow for the disqualification of a parent of a child for whom a Supervision Order or Care Order under section 31 of the Children Act 1989 has been made. The proposed statutory instrument as consulted on, however, mirrored the England regulations which do not include the term Supervision Order, referring only to Care Order.
- 4.10 The purpose of each of the new provisions is detailed below:-
- The inclusion of cautions as well as convictions

In January 2008, the Children Act 1989 was amended to give the Welsh Ministers power to disqualify from registration people who were given cautions in respect of prescribed offences. The inclusion of cautions as well as convictions reflects the fact that in both cases, the person has been found to have committed the offence in question.

- The addition of overseas offences

This new provision sets out that disqualification from registration also applies to offences committed overseas which are comparable to the offences set out in the draft Regulations.

- The inclusion of repealed statutory offences

The regulations provide that a person is disqualified for registration if they have been found to have committed any of the statutory offences listed in a Schedule to the regulations, despite the fact that the offence has been repealed.

- No waiver if included on a barred list or subject to court disqualification order

Whilst the regulations provide for a waiver of the disqualification in certain circumstances, there is no power of waiver where the disqualification arises from inclusion in the children's barred list established by the Safeguarding Vulnerable Groups Act 2006 or from inclusion on one of the "old " lists (List 99 or the POCA list) or where the court has ordered that a person must not work in contact with children following conviction for certain offences against children.

- Separation of childcare and private fostering provisions

Historically, the childcare and private fostering disqualifications provisions have been contained within the same subordinate legislation, although there is no overriding reason why this should be the case. When the Children and Families (Wales) Measure comes into force, it is intended that the Disqualification Regulations will move from the Children Act 1989 to the Measure.

- Removal of 'parent of a child with a Supervision Order' as a disqualifying offence

The existing regulations allow for the disqualification of a parent of a child for whom a Supervision Order or Care Order under section 31 of the Children Act 1989 has been made. The draft Regulations issued for consultation, however, mirrored the England Regulations which do not include Supervision Order, referring only to Care Order.

5. Consultation

- 5.1 A short (14 day) consultation was undertaken with relevant local authority childcare managers/coordinators (statutory partners), and also the national childcare umbrella organisations (voluntary sector partners).

- 5.2 This exercise was undertaken on a small scale in reflecting the limited impact that this legislation is expected to have, and also the need to put in place the additional disqualification categories in order to bring Welsh and English safeguarding provisions in line and close the existing safeguarding gap.
- 5.3 The national childcare umbrella organisations have a very large membership of practitioners between them which presents a significant resource of actual business expertise. Their interests cover all aspects of childcare, including full day care, out of school care, playgroups, and Welsh language provision. These organisations are fully up to date with all the key issues affecting the sector, including the views of their colleagues in other parts of the United Kingdom, and are able to speak confidently for the sector.
- 5.4 Local authorities have a duty, under the Childcare Act 2006, to secure sufficient childcare for working parents, by undertaking strategic action with their partners to address any gaps. In particular, local authorities must consider childcare in respect of which the childcare element of Working Tax Credit is payable, childcare which is suitable for disabled children, and childcare involving the use of the Welsh language. Local authority childcare managers/coordinators are best placed to advise of any likely impact of childcare legislation on the ability to ensure sufficiency at a local level.
- 5.5 Eight responses to the consultation were received, and an analysis of these is provided at Annex 1.
- 5.6 In summary, respondents unanimously agreed with the proposed changes to the regulations. The only exception being the proposed removal of the disqualification provision relevant to the parent of a child in respect of whom a Supervision Order has been made.
- 5.7 Two respondents felt that this would remove a level of safeguarding and would demonstrate a lack of cooperation essential to the profession of childminding.
- 5.8 As a result of the consultation responses, we have retained this specific qualification in the new Regulations but have determined that this would be one of the types of disqualification for which a waiver could be granted. Therefore, there would be an opportunity to decide that a person should not be disqualified on this ground, if it was considered that the circumstances surrounding the making of the Supervision Order did not give rise to sufficient concerns. The existence of the waiver provision could meet any concerns that it would be disproportionate to impose disqualification on this ground, as it is not a blanket prohibition and the waiver provisions allow for exceptions to be made.
- 5.9 Under the circumstances, therefore, this provision has been reintroduced into the amended Regulations. This will address any concerns that a

lower safeguarding threshold has been set, and flexibility to waive such a disqualification will also address concerns that this provision might be disproportionate or excessive.

- 5.10 As no further issues were raised, no other changes have therefore been made to the draft Regulations.

6. Regulatory Impact Assessment (RIA)

- 6.1 The proposed legislation has no impact on the statutory duties (sections 77 -79 GOWA 06) or statutory partners (sections 72-75 GOWA 06).
- 6.2 A Regulatory Impact Assessment has not been prepared as the proposed legislation imposes minimal or no costs/savings on the child care sector.
- 6.3 The impact of the proposed changes to subordinate legislation will be minimal. The bulk of the provisions remain the same as those within the existing Disqualification from Caring for Children (Wales) Regulations 2004, with only some simple changes to bring the legislation in Wales in line with that in force in England; and also to separate out the private fostering and child care provisions prior to the commencement of the Children and Families (Wales) Measure, which does not include any private fostering provisions.
- 6.4 The non-financial impact of failing to amend the disqualification regulations to include the additional categories of offences would mean that a person who is disqualified in England due to a qualifying offence under these categories would still be able to establish a childcare business in Wales. The consequences of this safeguarding gap would be serious should such a person subsequently go on to harm a child in their care.
- 6.5 Due to the nature of the legislation, which prevents certain categories of people from becoming registered as childcare providers in Wales, it would be extremely difficult to map the likely impact of the proposed changes.
- 6.6 The Regulations set out the categories of persons who are disqualified from registration in Wales as child minders or providers of day care. Where a person falls within any of these categories, they will not necessarily reach the stage of submitting an application for registration (which would only be declined). Those with disqualifying criteria may equally become self-informed of their unsuitability to register as a child minding or day care provider and, therefore, make no enquiries. They may also proceed as far as making enquiries with CSSIW, and then realise that they are unsuitable and so withdraw from the application process.
- 6.7 For those who do receive an application form, it is made clear within that their backgrounds will be checked. It is set out in the application form that inspectors will use all relevant legislation (including, currently, The

Disqualification from Caring for Children (Wales) Regulations 2004) to check applications. Specific questions also ask whether the applicant, or anyone who lives with them, have ever been convicted of a relevant offence, or are a relevant person under the Disqualification regulations. The system for excluding those with disqualifying offences/criteria, therefore, is quite robust.

- 6.8 This presents a difficulty in determining exactly how many people are likely to be affected by legislation that disqualifies them from becoming providers of day care or child minders. There is no way of determining the numbers of people who are aware that they would not be suitable, and would otherwise wish to register as a provider. Equally, no figures are held of the numbers of people who are advised, prior to a formal application for registration, that they would not be suitable. In any case, those who express an interest at this stage would not necessarily divulge that they have disqualifying criteria, simply choosing instead to withdraw their interest and not proceed any further with the application process.
- 6.9 For those that do proceed to application stage before being declined under existing disqualification provisions, CSSIW do retain details. In the period April 2009 to April 2010, only one applicant was refused a registration due to an offence specified in the disqualification schedule.
- 6.10 It is very unlikely that a child minder would proceed with a formal application should they be aware that a mandatory Criminal Records Bureau check would reveal offences preventing them from practising as such. This would explain why the number of applications refused under disqualification provisions is so low that it almost never occurs. In such cases, though, the disqualification could be due to the offences of an applicant's partner which, at the time of application, the applicant may not necessarily be aware of.
- 6.11 In summary, it is not possible to assess the numbers of people that would be refused registration to practise as a child minder or provider of day care under existing or proposed disqualifications legislation, as these figures are not known. However, if taking as a guide the numbers of people formally refused at application stage, it can be assumed that very few people with disqualifying offences actually explore/consider working as a child carer for children under eight years old.

Summary of consultation responses

No	Respondent	Date received
1.	Isle of Anglesey County Council	28.5.10
2.	National Day Nurseries Association (NDNA)	7.6.10
3.	Ceredigion Family Information Service	10.6.10
4.	Clybiau Plant Cymru Kids' Clubs (CPCCKC)	10.6.10
5.	Bridgend County Borough Council Childcare Team	11.6.10
6.	National Childminding Association (NCMA)	11.6.10
7.	Wales Pre-school Providers Association (WPPA)	13.6.10
8.	Play Wales	14.6.10

1. Isle of Anglesey County Council

Takes the view that regulations should include Supervision Order also, as the grounds for making the Order are the same for the making of a Care Order (which has been retained in the proposed Regulations). The grounds being “the child is at risk of significant harm”.

States that a Supervision Order is sometimes made because the parents have cooperated with the court process and the harm can be managed in this way, the children remaining at home. However, had the parents cooperated from the beginning, then there would be no need to apply to court for any Order.

The respondent further feels that cooperation is imperative for those working as a child minder and that the making of a Supervision Order should therefore disqualify anyone from caring for children.

In response, Assembly Government officials considered the issues in more detail and the view was taken that Supervision Order should be reinserted into the draft Regulations (see 5.10). The respondent has been informed of this.

2. National Day Nurseries Association (NDNA)

NDNA supports all amendments to the Regulations, adding that safeguarding the welfare of the child must be a priority and requires a robust approach.

The organisation raises the importance of ensuring that any legislative changes are understood by the sector. It is recommended that a communication strategy be developed.

The respondent has been advised that we will be considering how best to communicate details of the legislative changes to the sector, in partnership with our colleagues in CSSIW.

3. Ceredigion Family Information Service

States that the Regulations in England and Wales should be the same, and hopes that the amended Regulations will be sent out to all providers before inspections so that they are aware of the legislation beforehand.

Asks if the National Minimum Standards will be updated also as these are easier for providers to understand.

The respondent has been advised that we will consider how best to raise awareness in partnership with CSSIW. Also confirmed that we are in the process of updating the National Minimum Standards and these should be available early next year.

4. Clybiau Plant Cymru Kids' Clubs (CPCKC)

Comments that the changes appear to make perfect sense.

5. Bridgend County Borough Council Childcare Team

Agrees that those disqualified in England should also be disqualified in Wales, and is concerned that this is not currently the case, leaving a safeguarding gap.

Therefore, the respondent supports the draft Regulations. Also in agreement with the separation of childcare and private fostering disqualification legislation as these will ultimately fall under different primary powers.

6. National Childminding Association (NCMA)

Welcomes and supports policy and legislation that will improve the safety of children being cared for.

Agrees with the closure of the current safeguarding gap between England and Wales, and the inclusion of the new categories of disqualified persons.

Regarding the separation of childcare and private fostering disqualification legislation, the respondent suggests that this could have been dealt with by including provisions around private fostering in the Children and Families (Wales) Measure. Under the circumstances, though, comments that it seems sensible to separate them although it is noted that some childminders are increasingly becoming involved in private fostering and some are requiring advice and support around their regulatory responsibilities.

Finally, the organisation questions the removal of the Supervision Order provision, as this appears to remove a level of safeguarding.

The organisation has been advised that the Supervision Order provision will now be re-inserted into the new Regulations. With regards to the issues raised around support for childminders involved in private fostering, a discourse has been opened with the organisation to clarify what the particular issues are for childminders. The organisation has also been referred to the existing guidance; *'Do you look after someone else's child?'*

7. Wales Pre-school Providers Association (WPPA)

The organisation thinks it a good idea to bring Welsh regulations in line with the English, as anything that keeps children safe has to be good.

8. Play Wales

Has no objections to the proposals.